

Mem^d Duke Hamilton

17
(22-0)
November 17. 1770.

MEMORIAL

FOR

DOUGLAS Duke of HAMILTON, and his
Curators,

AGAINST

Mr Robert Hunter of Elrig, Professor of Greek in the
University of Edinburgh, and others.

THE questions concerning the division of the commonities of Reddingrig and Whitesiderig, have been repeatedly the subject of your Lordships deliberation. As a great number of persons claimed an interest in these commonities, and founded their pretensions upon various rights, it was judged most expedient to try the merits of their several claims, by dividing them into different classes, according to the nature of their respective rights: so that, by determining the claims of one or two in each class, the court might decide upon the rights of all.

Upon this plan, the Lord Coalston, who was Ordinary in the di-
vision, pronounced a very long and most accurate interlocutor, de-
termining, with great precision, the rights of the several parties;
and his Lordship having afterwards reported the cause to the court, July 30. 1768.
your Lordships pronounced the same judgement, with very little va-
riation.

Some inferior matters, however, still remained to be decided, re-
specting the classes in which some of the claimants fell to be rank-
ed, and the rule of division to be observed amongst some of the
competing parties. The cause, in absence of the Lord Coalston,
having been remitted to the Lord Justice-Clerk, his Lordship pro-
nounced a judgement, which, in so far as is necessary to recite it July 13. 1770.

A

for

Mr Rob Hunter
Leg Just Clerk

7th Feb 1771

cannot distinguish
between the 4 cases
of 4 cases already
determined - as to 4
others, as differences
among parties, agreed
to properly can be
allotted to a remainder
- doubtless for some
- have been upon
a division of the same
than is necessary for
temporary distinction.
Common property of
the Middleton - 1500
as to Elrig

for the purpose of the present memorial, is in these terms: "With respect to Mr Robert Hunter's claims upon the common, in right of his lands of Elrig and Middlerig, makes avisandum to the Lords; and ordains the parties interested in that question to give in memorials to the boxes against the 1st day of August next: And whereas, by the aforesaid interlocutor of 30th July 1768, the Duke of Hamilton is found intitled to a share in the division according to the valued rent of those farms holding of him which are *in pari casu* with Gilbert Laurie's; and the said Gilbert Laurie, and other feuers of Duke Hamilton who are *in pari casu* with him; are found intitled to be continued in possession of their servitudes, till such time as shares of the common shall be set off to them, sufficient to answer their said servitudes; also makes avisandum to the Lords with these questions: 1st, Whether the said feuers can oblige Duke Hamilton to divide that share of the common which shall be allocated to his Grace, so as each feuer may have a share of the common appropriated to him effeiring to his servitude? and, 2^{dly}, In case the feuers can force such division, by what rule the same ought to be made? And ordains parties to lodge memorials on these points, in the boxes, betwixt and the said 1st of August next." The time for lodging the memorials was afterwards prorogated by the Lord Ordinary to a later day.

The first question taken to report by the Lord Ordinary, respecting Mr Robert Hunter's claims for his lands of Elrig and Middlerig, falls to be judged from the terms of his rights to these lands, supposing his possession to have been such as to preserve the right which his titles gave him.

The titles produced by Mr Hunter for his lands of Middlerig are,

Charter of confirmation granted by James Marquis of Hamilton, in favour of Sir William Monteith of Kerse, of date 14th August 1621; by which the Marquis confirms a charter, dated the 25th May 1611, granted to the said Sir William Monteith, by Sir John Bruce of Airth, of Sir John's lands of Middlerig, "cum domibus, ædificiis, hortis, lie outsettis, moris, mareis, pratis, pasturis, annexis, connexis, partibus, pendiculis, et pertinentiis suis quibuscunque, jacen. nunc in baronia et regalitate nostra de Polmonth." This charter of confirmation contains a clause of *Novodamus*, in these terms: "De novo damus, concedimus, et disponimus,

" disponimus, memorato Domino Willielmo Monteith de Kerse,
 " Militi, hæredibus suis masculis, assignatis, et successoribus
 " suis quibuscunque, præscript. hæreditariè et irredimabiliter,
 " ut supra, totas et integras prænominatas terras nostras de
 " Middlerig, cum domibus, ædificiis, hortis, lie outsettis, mo-
 " ris, mareis, pratis, pasturis, annexis, connexis, partibus, pen-
 " diculis, et pertinentiis suis quibuscunque; *una cum plena li-*
 " *bertate, potestate, et privilegio jactandi cespites, vulgo of casting*
 " *feuel, feal, diffatis, et turfis, super communem morum de Redding,*
 " *solet, et consuet.;* necnon cum plena potestate et privilegio di-
 " cto Domino Willielmo, suisque successoribus, baronibus baronia
 " de West Kerse, jactandi cespites, vulgo of casting feuel, feal, dif-
 " fatis, et turfis, super præscriptum communem morum de Red-
 " ding, et easd. transportandi ad eorum hbitum, pro eorum pro-
 " prio usu, et non aliorum, sine impedimento quocunque; cum li-
 " bero introitu et exitu ad præfatum morum, jacen. in nostra ba-
 " ronia et regalitate de Polmont," &c.

Charter, of date 28th November 1624, by William Monteith of
 Kerse-mill, to Alexander Hamilton, of the lands of Middlerig,
 " with houses, biggings, yards, mosses, pasturages, parts, pendi-
 " cles, and pertinents whatsoever, *with full liberty, power, and*
 " *privilege, of casting feuel, feal, divots, and turfs, upon the common*
 " *muir of Redding, conform to use and wont.*" This charter in the
 clause *Tenendas*, bears, " coals, coal-heughs, multures, pasturages,"
 &c.

Charter, of date 6th February 1629, by William Monteith, to
 Patrick Gray of Straith, of the said lands of Middlerig, with
 houses, biggings, &c. as in the preceding charter.

Charter of confirmation of the last-mentioned charter by Anne
 Duchess of Hamilton, of date 23d December 1670.

Seisin in favour of Elisabeth Gray, daughter of James Gray, el-
 dest son of Patrick Gray of Wester Straith, in the said lands of Mid-
 dlerig, proceeding upon a precept of *Clare constat* by the commis-
 sioners of the Duke of Hamilton, dated 18th August, and regi-
 strate, at Stirling, 7th October 1738.

Decreet of sale of these lands, in favour of Professor Hunter, da-
 ted 31st January, 16th and 23d July, 1755.

Thus it appears from Mr Hunter's titles, that the lands of Mid-
 dlerig were granted to him, and his authors, by the memorialist's
 predecessors, *with full liberty, power, and privilege, of casting feuel,*
feal, divots, and turfs, upon the common muir of Redding, conform

to use and wont ; from which, as the memorialist is advised, it is very evident, that he has no right of property in the muir in question, but only a right of servitude ; which servitude is, by his title-deeds, limited to the particulars therein mentioned.

If Mr Hunter shall alledge, that his possession has been more extensive than his titles, and that he has enjoyed not only the privilege of casting feuel, feal, &c. but also of pasturing his cattle upon the muir ; the effect of such possession may perhaps be, to extend his servitude beyond the limits of the original constitution thereof, and to give him a right of pasturage, as well as of casting. But it is impossible that his possession, though somewhat more extensive than his titles, could ever alter the nature of his right, or convert his servitude into a property ; nor could he, by any length of possession, acquire a right contradictory to the titles which were the foundation of his possession.

Mr Hunter had, by his titles, a servitude of casting upon this muir ; and he cannot, by possessing the pasturage, have acquired a right of property to it ; else he would have a servitude upon his own property, which is absurd.

In the case of Gilbert Laurie, and others of the memorialist's feuers in this very cause, whose titles bore a privilege of servitude upon the muir ; although their servitude was more comprehensive, and not limited like that of Mr Hunter ; and although their possession was immemorial, and fully as extensive as his has been ; your Lordships found, that they were not to be considered as joint proprietors, but intitled only to a servitude ; and that, as is expressed in the interlocutor, " in respect the original grant purports only " a servitude." The same judgement, for the same reason, will fall to be pronounced in regard to Mr Hunter's lands of Middlerig.

The titles of the lands of Elrig produced by Mr Hunter are, Seisin, dated 5th July, and registrate at Stirling 1st September, 1704, proceeding on a precept of *Clare constat* granted by the Duchess of Hamilton, in favour of Thomas Russel, of the forty-shilling land of Elrig, and pertinents, *together with the pasturage of cattle, and privilege of common within the bounds of the common muir of Reddingrig and Whitesiderig, conform to old use and privilege ;* reserving to the Duke, and his heirs, the haill coal and coalheughs within the bounds of the said lands of Elrig, pertinents and commony thereof, with liberty to set down sinks within any part of the said lands of Elrig, except the two principal dwelling-houses and yards thereof,

of, and the length of three pair of butts next and adjacent there-
to.

Decreet of the Lords of Session, dated 9th July 1717, finding the lands of Gardrum to be part and pertinent of the lands of Elrig, and, as such, to belong in property to Thomas Russel of Elrig.

Seisin, dated 3d, and registrate 12th June, 1724, on a precept of *Clare constat* by the Duke of Hamilton, in favour of James Clarkson of Croftandie, of the lands of Croftandie, being a fourth part of the forty-shilling land of Elrig, *together with the pasturage of cattle, and privilege of commony within the bounds and commony of Reddingrig and Whitesiderig, conform to all use and privilege.* This seisin contains the reservation of coal, &c. in favour of the Duke of Hamilton, in the same terms as the seisin above mentioned to Thomas Russel.

Disposition, dated 17th May 1756, registrate in the books of Session, 26th June 1761, by James Clarkson, to Professor Hunter, of the said lands of Croftandie, with pertinents thereof, *together with the pasturage of cattle, and privilege of commony within the bounds and commony of Reddingrig and Whitesiderig, conform to old use and privilege,* with the reservation above mentioned, as to coal.

Disposition, of date, 29th May 1741, by Thomas Russel of Elrig, to Robert Fleming printer in Edinburgh, of all and hailt these parts and portions of the lands of Elrig then belonging to him, together with his share and proportion of the common muirs of Reddingrig and Whitesiderig.

Seisin thereon, in favour of Robert Fleming, dated 29th May, and registrate 30th June, 1741.

Disposition of the premises by the said Robert Fleming, in favour of Professor Hunter, of date 15th July 1746.

From these titles it is evident, that the right granted upon the muir in question, to Professor Hunter's authors, in the lands of Elrig, was no more than a right of servitude, which must be entirely exclusive of the claim now made by him of a common property in these muirs.

This question has indeed been already determined by your Lordships in this very cause; for you have already pronounced judgement upon titles in effect the same with Mr Hunter's. The grants to Gilbert Laurie and the other feuers in his situation, contained a clause giving them an interest in the muir, in these terms: "with
" houses, biggings, yards, mosses, muirs, &c. together with the pastu-
B " rage

"*rage of cattle, and privilege of commony, within the bounds of*
 " *the common muir of Reddingrig and Whitesiderig, conform to old use*
 " *and privilege, belonging to the said lands, and all other liberties*
 " *and commodities used and wont.*"

Gilbert Laurie and the other feuers had upon these titles enjoyed a possession, at least as extensive as Mr Hunter can pretend to; and they insisted, that in virtue of their titles and possession, they had a right of common property in these muirs. But your Lordships, upon full consideration of the case, and upon the principles which had been formerly established, in the cases of the muir of Biggar, and muir of Tranent, did, by your judgement above mentioned of 30th July 1768, "find, That in the year 1633, the
 " then Marquis of Hamilton did by feu-contract dispone, in fa-
 " vour of David Livingston, five oxgangs and half an oxgang of
 " the lands of Over Polmont, with parts, pendicles, and pertinents,
 " *together with the pasturage of cattle, and privilege of commony*
 " *within the bounds of the common muir of Reddingrig and Whiteside-*
 " *rig, conform to old use and wont:* Find it proved, That the posses-
 " sors of the said lands have been immemorially in use of pastu-
 " ring their cattle, and casting feuel, seal, and divot, on the said
 " muirs; but in respect the original grant imports only a servi-
 " tude, find, That the defender Gilbert Laurie, as deriving right
 " from the said David Livingston, is not to be considered as a
 " joint proprietor, but is only intitled to be continued in posses-
 " sion of his servitude, till such time as a share shall be set off to
 " him sufficient to answer the servitude: And find, That the whole
 " other defenders who are *in pari casu* with the said Gilbert Laurie,
 " are in like manner to be continued in possession of their respec-
 " tive servitudes, until such time as shares shall be set off to them
 " as aforesaid."

This judgement appears to be decisive against Mr Hunter's claim of common property in right of his lands of Elrig. The only circumstance upon which Mr Hunter can pretend to difference his case from that of Gilbert Laurie, is the reservation of the coal in favour of the Duke of Hamilton; from which it may be argued, that this reservation does imply, that it was a right of common property which was given him, because if it had been only a servitude, there was no need of any such reservation to the Duke, who continued proprietor.

That

That this reservation, in so far as it concerns the commony, was altogether unnecessary, shall readily be acknowledged; though it is obvious by what means it came to be inserted. Had the reservation of the coal been confined to that of the common muirs, over which the servitude was granted, the argument would have been more plausible, that it must have intended a grant of property, not of servitude. But your Lordships will observe, that this is by no means the case: the reservation is also of the coal within the property-lands of Elrig; *and as it could not possibly be meant to dispose the coal in the commony, when the coal was to be reserved even in the principal lands, the reservation was not improperly expressed, as reserving the coal in both.*

Although therefore it is true, that since the grant gave only a right of servitude in the muirs, the coal therein, as a part of the property, must have remained with the Duke without any reservation for that purpose; yet this is no more than what happens in many cases, where the writer of a deed, from caution, and upon the salutary maxim, *Superflua non nocent*, adds words, expletives, and sometimes whole clauses, that are absolutely useless. But where the substantials of a deed are clear, these unnecessary additions cannot detract from it. And it seems absurd to say, that a clause reserving to the Duke what would have belonged to him without any such reservation, can have the effect to take away from him a property which he did not dispose.

The memorialist comes now to the other questions to be reported by the Lord Ordinary, viz. How far the feuers holding of the memorialist, can oblige him to divide that share of the muir which is to be allocated to him, in right of their feus, so as each feuer may have a share of the common appropriated to him, effecting to his servitude? And, *2dly*, In case they can force such division, what is the rule by which the same ought to be made?

How far it might be expedient for the Duke of Hamilton, if he was of an age to judge and determine in his own affairs, to agree to the division here mentioned, is a consideration which the other memorialists, his curators, cannot enter into: but they apprehend, that it would be improper for them to make any concessions on his part; and they are advised, that the feuers cannot in law oblige the Duke to make the division that is now demanded.

By your Lordships interlocutor of 30th July 1768, the Duke, as proprietor,

proprietor, is found intitled to a share in the division, corresponding to the valued rent of such of the grounds holding of him as have only a right of servitude in this commonity. Here then are two separate independent interests; a right of property in the one, a servitude in the other; and such being the nature of their respective rights, the Duke is advised, that neither by the common law, nor by the statute 1695, are the feuers intitled to demand a division.

The statute 1695 was meant to supply the defect of the common law. It respects only the division of rights of common property; and assumes for the rule of division, the valuation of the respective properties. It is the concurrence of such mutual rights of the same nature that constitutes a common property. But there is no such common right in the present case: the Duke has the sole and exclusive right of property; the feuers have but a limited right of servitude, for the use of the dominant tenements, in common with the Duke's other property-lands, which have possessed the like right of pasturage, &c. upon those common grounds; from which superficial promiscuous possession these grounds have acquired the names of a commonity, though common in no other respect than what regards the promiscuous superficial use.

And such being manifestly the nature and extent of the parties rights to these common grounds, there is no principle of law or justice that can intitle those who have only a right of servitude, to convert that servitude into a property, or to compel the proprietor of the servient tenement, who has granted only a servitude over his lands, and consequently had reserved to himself the absolute right of property, to abandon the same, by converting the servitude into a right of property.

These principles appear to be founded in reason, and have had the sanction of the judgements of this court in various instances. Thus, in particular, it was, that in 1741, in the case of Sir Robert Stewart of Tillycoultry, your Lordships refused the division, upon the act 1695, of a subject similar to that in question, where the property belonged to one, subject to a servitude of pasturage in favour of the other; though it was the proprietor of the servient tenement, who, in that case, pursued for the division, your Lordships refused it, as having no authority from the statute 1695, and there seems stronger reason for giving the same judgement in this case, where the division is opposed by the proprietor.

In

In a later case, 3d June 1748, Sir George Stewart against John Mackenzie, where pretty much the same question occurred, betwixt the proprietor of a muir, and a person having a servitude upon it, your Lordships pronounced a similar judgement: for though you allowed the superficies of the muir to be divided according to the interests of the parties, yet you kept the property entire.

As therefore a division, in so far as concerns the property, cannot at all take place in the present case, it is unnecessary to inquire by what rule such division would fall to be made. There is, however, one sort of division which does not infringe upon the property, which the memorialist will beg leave to propose in this case, and which, he hopes, will not be opposed by the feuers.

The memorialist is advised, that where a muir, or other subject liable to a servitude, is greatly more than sufficient for answering the purposes of the dominant tenement, the law allows the proprietor to take into his own possession, for culture, or otherwise, such parts of the subject as are not necessary for the dominant tenement, care being taken that as much shall be always left as may be fully and largely sufficient for answering the servitude.

And, indeed, the justice of this is very apparent. For, supposing a small dominant tenement, consisting of a few acres, to have a servitude of pasturage over an extensive muir of many miles circumference, it would surely be highly unreasonable to say, that the whole of such a muir must remain for ever useless and unprofitable to the proprietor, on account of a petty servitude, which might perhaps be fully satisfied by a small corner of it.

But the law imposes no such unreasonable hardship upon proprietors, nor puts such a cruel bar upon the improvement of the country; on the contrary, it allows the proprietor of the servient tenement to have the use of his property, in so far as in using it he does not incroach upon what is necessary for the purposes of the servitude.

Such is the doctrine laid down by Lord Bankton; who, in treating of common pasturage, says, "The proprietor of the servient B. 2. tit. 7. § 32.
"tenement may plough parcels thereof, notwithstanding the common pasturage to which the parts that lie unlaboured must always be subservient, and sufficient to answer the same."

The memorialist has reason to believe, that the several portions of the muir, effeiring to the valued rent of each of the farms to
C which

which he is found intitled as proprietor, subject to the servitude constituted to each of the feuers, are greatly more than sufficient for answering the purposes of the servitude competent to the several feuers; and that therefore he has right to use, at his pleasure, the several superplus parts of his property, setting aside to each feuer what may be amply sufficient for satisfying his servitude. In order to have this matter ascertained, it will be necessary that each feuer give in a condescendence of the extent of the servitude to which he has right, and of which he has been in the possession.

In respect whereof, &c.

W. NAIRNE.